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In The Supreme Court of the United States

OCTOBER TERM, 1978

CITIZENS BANK & TRUST COMPANY OF PARK RIDGE, ILLINOIS, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

REFORD J. WEDEL
Acting General Counsel

RONALD R. GLANCZ
MICHAEL KIMMEL
Attorneys
Department of Justice
Washington, D.C. 20530

MYERS N. FISHER
Assistant General Counsel

ANN GRAHAM
CECIL UNDERWOOD
Attorneys
Federal Deposit Insurance Corporation
Washington, D.C. 20429

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 592 F.2d 364. The order of the district court (Pet. App. 18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1979 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim against the Federal Deposit Insurance Corporation (FDIC) is barred by the Federal Tort Claims Act.

2. Whether a claim barred by the Federal Tort Claims Act may nonetheless be maintained against the Federal Deposit Insurance Corporation because the Federal Deposit Insurance Act allows the FDIC to "sue and be sued."

STATUTES INVOLVED

1. The Federal Tort Claims Act provides in pertinent part:

> (b) * * * [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(28 U.S.C. 1346(b).)

* * * * *

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(28 U.S.C. 2679(a).)

* * * * *

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(28 U.S.C. 2680(a)).

2. The Federal Deposit Insurance Act, 12 U.S.C. 1819, provides in pertinent part:

> Upon June 16, 1933, the [Federal Deposit Insurance] Corporation shall become a body corporate and as such shall have power—
>
> * * * * *
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. * * * [A]ny such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. * * *

STATEMENT

On February 14, 1975, the Ohio Superintendent of Banks took possession of the business and property of the Northern Ohio Bank, a state bank chartered under

the laws of Ohio. Pursuant to Ohio law (see Ohio Rev. Code Ann. §1113.05(M) (Page's)) and the Federal Deposit Insurance Act (see 12 U.S.C. 1821(e)), the Superintendent of Banks appointed the Federal Deposit Insurance Corporation (FDIC) receiver of the closed bank. On February 17, 1975, the FDIC as receiver entered into a "purchase and assumption" transaction with National City Bank of Cleveland, pursuant to Ohio Rev. Code Ann. §1113.05(G). National City Bank agreed to assume all of the deposit liabilities, and certain other liabilities, of Northern Ohio Bank and to purchase certain assets of that bank. The FDIC as receiver assigned the remaining assets of Northern Ohio Bank to itself in its corporate capacity in return for $90.25 million in cash, which was then turned over to National City Bank as part of the purchase and assumption transaction. National City Bank thus obtained assets and assumed liabilities in an equivalent amount.[1]

One of the assets of Northern Ohio Bank that National City Bank did not purchase was the closed bank's interest in a loan previously made, in participation with petitioner, to Gananda Development Corporation. Gananda had defaulted on that loan. Another asset of the closed bank that National City Bank did not purchase was the closed bank's correspondent account with petitioner in the amount of $300,868.84. Both of these assets were transferred by the FDIC as receiver to itself in its corporate capacity.

In March 1975 the FDIC demanded that petitioner remit to it the $300,868 in the closed bank's correspondent account. Petitioner refused. The FDIC then brought this action in the United States District Court for the Northern District of Illinois (where petitioner is located) to recover those funds.

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[1] By assuming liabilities of $3.75 million in excess of assets purchased, National City Bank obtained, as an asset, the ongoing business of the closed bank.

Petitioner filed an administrative claim against the FDIC, as receiver, for damages of $348,000—the amount of petitioner's participation in the Gananda loan—against the closed bank. Petitioner alleged that Northern Ohio Bank had wrongfully induced it to participate in the Gananda loan by misrepresenting the existence of collateral and was thus liable to petitioner for its participation in that loan. The FDIC rejected petitioner's claim (Pet. App. 4a), and petitioner sought review of that rejection in state court, where the issue is now pending. See note 2, *infra*.

Petitioner also asserted in this action a right to set off $300,868 of its $348,000 damage claim from the correspondent account that was the subject of the suit, and a counterclaim against the FDIC for $47,131, the balance of its alleged damages. The district court granted the FDIC's motion to strike the set-off defense and the counterclaim and entered summary judgment for the FDIC on its claim to recover the funds in the correspondent account (Pet. App. 18a)

The court of appeals affirmed (Pet. App. 1a–17a). The court concluded that petitioner's claims against the FDIC (whether in the form of a set-off or as a counterclaim) were in essence money damage claims against the FDIC for alleged wrongful conduct, and, as such, were cognizable under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2679(a) (Pet. App. 7a–8a). The court held that the claims were barred by the statutory and discretionary function exception of that Act, 28 U.S.C. 2680(a) (Pet. App. 14a). The court also held that the FDIC's statutory authority to sue and be sued (12 U.S.C. 1819 Fourth) did not provide an independent source of authority on which to base the lawsuit (Pet. App. 8a–15a).

ARGUMENT

The court of appeals reached the correct result, and its decision does not conflict with that of any other

court. Hence, petitioner presents no question warranting this Court's review.

1. The allegation underlying petitioner's set-off and counterclaim is that the FDIC exceeded its authority under 12 U.S.C. 1823(e) because the purchase and assumption transaction did not fully protect petitioner's $348,000 claim against Northern Ohio Bank (Pet. 12).[2] Petitioner to the contrary (Pet. 10, 12), however, the court of appeals did not "indicate[]" that this allegation had merit; it merely analyzed the "nature of [petitioner's] claim" (Pet. App. 7a) and concluded that, "[a]ssuming that these duties [of FDIC] existed" (Pet. App. 8a), the claim sounded in tort and thus was cognizable, if at all, under the Federal Tort Claims Act (Pet. App. 8a, 17a).

Petitioner does not seriously dispute the conclusion that its claim is a tort claim (see Pet. 15 n.11), but it contends that the Federal Tort Claims Act does not apply because "the failure of an agency of the United States to carry out its statutory duty and [its actions] in excess of its power cannot be compared to the liability of a private individual under state law * * * " (Pet. 13). But it has been settled since *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), that the Act's waiver of sovereign immunity does not depend on whether the government's act or omission occurred in performing

[2]Petitioner understandably seeks to bring itself within *First Empire Bank* v. *FDIC*, 572 F.2d 1361 (9th Cir.), cert. denied, No. 78-289 (Oct. 16, 1978), in which the creditors successfully alleged that the purchase and assumption transaction there was an unlawful preference of creditors and a non-ratable dividend. See 12 U.S.C. 91, 194. However, petitioner has never proved the allegations concerning the loan participation transaction necessary to establish itself as a creditor. Petitioner's remedy is an action in state court to establish its claim and to challenge the receiver's failure to pay. Petitioner has filed such an action in the Court of Common Pleas, Cuyahoga County, Ohio; that action is still pending. *Citizens Bank & Trust Company of Park Ridge, Illinois* v. *FDIC*, No. 971118 (filed June 14, 1977).

"uniquely governmental functions." *Id.* at 64.

The court of appeals correctly held that petitioner's claim for money damages from the FDIC for alleged wrongful implementation of its statutory duties was, as a tort claim, barred by the statutory and discretionary function exception of the Federal Tort Claims Act. 28 U.S.C. 1346(b), 2680(a). See *Bub Davis Packing Co.* v. *United States*, 443 F. Supp. 589 (W.D. Tex. 1977), aff'd, 584 F.2d 116 (5th Cir. 1978), cert. denied, No. 78-1284 (April 30, 1979); *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, 506 F.2d 1213 (9th Cir. 1974). In addition, the court of appeals pointed out that petitioner failed to file an administrative claim under 28 U.S.C. 2675(a) (see Pet. App. 7a n.3), and thus the claim is barred under the Act regardless of whether the statutory exception applies. See *DSI Corp.* v. *Secretary of HUD*, 594 F.2d 177, 180 (9th Cir. 1979).[3]

[3]There is no doubt that the court of appeals was correct in holding that a claim "cognizable" under the Federal Tort Claims Act (see 28 U.S.C. 2679(a)) remains so despite the applicability of an exception to the Act, under 28 U.S.C. 2680, barring the claim. See cases cited at Pet. App. 10a-14a. Even if we were to assume that petitioner's claim against the FDIC in this case was not "cognizable" under the Tort Claims Act because the claim, if sustainable on the merits, would not appear to be payable from general United States Treasury funds, (compare *DSI Corp.* v. *Secretary of HUD*, *supra*, 594 F.2d at 179-180), the judgment may still be sustained because petitioner's claim, as a challenge to the FDIC's actions as receiver, should have been brought in the appropriate Ohio state court. See pages 10-11, *infra*.

Moreover, because petitioner's claim for money damages is against the FDIC in its corporate capacity, even if that claim is independent of the Tort Claims Act the FDIC could still invoke an analogous statutory and discretionary function defense. Cf. *Gercey* v. *United States*, 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977) (discretionary function bar applicable to Suits in Admiralty Act); *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007-1011 (Ct. Cl. 1967) (discretionary function bar applicable to suits under Tucker Act).

Nor is there merit to petitioner's argument (Pet. 14) that application of the discretionary function exception (28 U.S.C. 2680(a)) to the purchase and assumption transaction here will immunize any governmental action, no matter how arbitrary and excessive. As the court of appeals noted, the statute immunizes only those acts done with due care, and if the FDIC committed a tort here, "it resulted from a misinterpretation of [the purchase and assumption statute], not from acting without due care" (Pet. App. 10a n.6).

Finally, little need be said of petitioner's contention (Pet. 15–16) that the "sue-and-be-sued" clause of the Federal Deposit Insurance Act, 12 U.S.C. 1819 Fourth, allows petitioner to maintain its claim for damages here. 28 U.S.C. 2679(a) expressly precludes reliance on "sue-and-be-sued" authority for claims "cognizable" under 28 U.S.C. 1346(b). Petitioner's argument is premised on its belief that the Federal Tort Claims Act is not applicable to these facts (Pet. 15). But as we have shown, petitioner's claim is "cognizable" under the Act insofar as it sounds in tort against the government; the Act simply provides an exception that preserves the government's sovereign immunity for discretionary functions. And as the court of appeals observed, every court of appeals that has considered the question has concluded that the "suability of sue-and-be-sued federal agencies and corporations is now governed solely by the Federal Tort Claims Act, and that governmental immunity extends to classes of torts excepted from the coverage of that Act" (Pet. App. 10a; citations omitted).

Indeed, the only contrary decision was the Seventh Circuit's prior holding in *Baker* v. *F&F Investment Co.*, 489 F.2d 829, 835, 836 (1973), a holding that the court below re-examined and abandoned (Pet. App. 11a–15a). Moreover, as the court of appeals noted (Pet. App. 14a–15a), the House and Senate Reports on the bill that became the Federal Tort Claims Act specifically stated that the bill's intent was to remove "sue

and be sued" clauses as independent bases of government liability for money damages in tort suits. H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33–34 (1946). This intent is manifested in Section 2679(a). Thus, petitioner unfairly accuses the court of appeals of "slamm[ing] the door on suits which could have been brought [under a "sue and be sued" clause] prior to the passage of the FTCA" (Pet. 13); it is Congress, for substantial policy reasons, that has "slammed the door."

2. There is no conflict between the decision below and *First Empire Bank* v. *FDIC*, 572 F.2d 1361 (9th Cir.), cert. denied, No. 78–289 (Oct. 16, 1978). In that case, the Ninth Circuit held that the purchase and assumption transaction fashioned by FDIC for the closed bank amounted to a preference of creditors in violation of 12 U.S.C. 91 and was not a "ratable" dividend as required by 12 U.S.C. 194. Although the purchase and assumption transaction involved here shares some similarities with that involved in *First Empire Bank*, and although petitioner strives to portray the decision below as concluding that the FDIC was similarly in violation of statute here (Pet. 10, 18–19), the court of appeals did not reach the question whether the transaction violated ratable distribution requirements, because it held that the FDIC was immune from suit. The court of appeals was merely assuming arguendo such a violation, and FDIC's consequent liability, in order to describe the nature of petitioner's claim. The court stated unambiguously that it was "unnecessary for us to reach the banking law question * * * which the Ninth Circuit decided in the *First Empire Bank* case" (Pet. App. 17a).

Petitioner fares little better with its contention (Pet. 18–22) that the decision below conflicts with *First Empire Bank* on the issue whether FDIC can be sued under the Federal Tort Claims Act. The court of appeals correctly concluded that, although *First Empire Bank* proceeded on the assumption that the FDIC was

amenable to suit, that decision did not even mention, and cannot be read as overruling, the Ninth Circuit's decision, less than four years earlier, in *Safeway Portland Employees' Federal Credit Union* v. *FDIC*, *supra*. In that case, the Ninth Circuit held that the Tort Claims Act precluded any suit premised on the "sue and be sued" clause of 12 U.S.C. 1819 Fourth. In *First Empire Bank*, on the other hand, the disappointed creditors of the closed bank sought direct judicial review of the receivership proceedings. Petitioner could not pursue such a course in this case; it has done so in state court. See note 2, *supra*.

The proper remedy against a closed state bank for a disappointed claimant who contests the disallowance of its claim, or who contests as unratable a receiver's distribution, is judicial review of the receivership proceedings in a state court having jurisdiction over the receivership and receiver.[4] This is true even where the receiver of the state bank is the FDIC. See 12 U.S.C. 1819 Fourth. Money damage claims against a receiver in his individual capacity are not authorized generally (except for fraud) and are barred under federal law where the receiver is the Federal Deposit Insurance Corporation. 28 U.S.C. 2679(a), 2680(a), (h). Whether petitioner will prevail in its state court action remains to be seen, but what is clear is that it is not entitled to vindicate its claim under the Federal Tort Claims Act.

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[4] A claimant whose claim against a closed Ohio bank has been rejected by the receiver, or not paid in accordance with law, may challenge the receiver's action in an Ohio court of competent jurisdiction (here, in the Court of Common Pleas for Cuyahoga County). See Ohio Rev. Code Ann. §§1113.06, 1113.09(C), 1113.12 (Page's); *Busher* v. *Fulton*, 128 Ohio St. 485, 191 N.E. 752 (1934); *Zinner* v. *Guardian Trust Co.*, 4 Ohio Ops. 51, 56 (Ct. Com. Pl. 1935).

Where the closed bank is a national bank, judicial review of the receiver's rejection or improper payment of a claim is in the United States District Court (or appropriate state court) in the district where the national bank is located. 12 U.S.C. 94; 12 U.S.C. 1819 Fourth; *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976).

The decision here simply holds that, under the circumstances of this case, a claimant has no right to sue or counterclaim against the FDIC for money damages, or to attach funds assigned to the FDIC, in an action by the FDIC to collect assets of the closed bank. In that context, the individual claimant is in effect seeking personal money damages for the FDIC's allegedly wrongful implementation of statutory duties (a damage claim barred by the statutory and discretionary function exception of the Federal Tort Claims Act), and is not seeking judicial supervision of the receivership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

REFORD J. WEDEL
Acting General Counsel

RONALD R. GLANCZ
MICHAEL KIMMEL
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